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September 24, 2004 T.R.A. DOCKET ROOM

Hon. Pat Miller, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Pkwy.  
Nashville, Tennessee 37243

Re: *Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*  
Docket No. 04-00186

Dear Chairman Miller:

Covad Communications Company ("Covad") wishes to bring to the attention of the Authority the recent recommendation from the Florida Public Service Commission Staff in the Florida docket parallel to this docket.<sup>1</sup> Although the recommendation is adverse to Covad's position, Covad believes it is important for the Authority to be aware of the recommendation as well as to understand the manifest legal error contained in it.

The Florida Staff recommendation is based on the conclusion that "line sharing does not meet the definition of a loop and therefore does not fall under the requirements of section 271(c)(2)(B)(iv)". This recommendation constitutes the first time anywhere that a commission staff has reached this conclusion. It is important to understand what the Florida Staff opinion means: that – in the opinion of the Florida Staff – line sharing never was a checklist item 4 element. This opinion, of course, begs two questions (not addressed in the Florida Staff recommendation). First, if line sharing never was a checklist item 4 element, why was it always addressed by the FCC in the section of its 271 orders examining checklist item 4 compliance? Second, if line sharing never was a checklist item 4 element, why does the FCC repeatedly say it is?

A few examples include: The *Massachusetts 271 Order*.

On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting

<sup>1</sup> *Staff Recommendation*, FPSC Docket no. 040601-TP, filed September 23, 2004 ("Staff Recommendation") (attached)

Hon. Pat Miller, Chairman  
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carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 **and** 4 of section 271.<sup>2</sup>

In this region, in granting BellSouth 271 authority to sell long distance in Florida and Tennessee, the FCC stated that, "BellSouth's provisioning of the line shared loops satisfies checklist item 4."<sup>3</sup> In the Georgia 271 Order at ¶ 239 (inexplicably cited by the Florida Staff for the proposition that it indicates "that line sharing is not required under checklist item 4"<sup>4</sup>), the FCC states: "We find that, given BellSouth's generally acceptable performance for all other categories of line-shared loops, BellSouth's performance is in compliance with checklist item 4."<sup>5</sup>

As Covad previously stated in its brief, these quotations are not anomalies: Every FCC 271 Order granting BellSouth long distance authority – indeed, in every FCC order granting any BOC such authority – the FCC placed line sharing in checklist item 4. In sum, the Florida Staff recommendation contradicts every prior 271 order from the FCC, every 271 brief from BellSouth, and numerous explicit statements of the FCC. It is, accordingly, wrong.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:   
Henry Walker

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<sup>2</sup> *In the Matter of Application of Verizon New England, Inc et al for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 164 (emphasis added) (relevant portions of the *Massachusetts 271 Order* are attached to Covad's brief filed September 3, 2004).

<sup>3</sup> *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No 02-307, FCC 02-331, Released December 19, 2002 at ¶ 144 (emphasis added) (relevant portions of the *BellSouth FL/TN 271 Order* are attached to Covad's brief filed September 3, 2004)

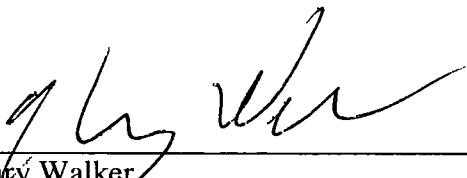
<sup>4</sup> *Staff Recommendation*, p 9, fn 31

<sup>5</sup> *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc, and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, WC Docket No 02-35, FCC 02-147, Released May 15, 2002, ¶ 239 (relevant portions of the *BellSouth GA/LA 271 Order* are attached to Covad's brief filed September 3, 2004)

**CERTIFICATE OF SERVICE**

I hereby certify that on September 24, 2004, a copy of the foregoing document was served on the parties of record, via electronically, U.S. mail or hand delivery:

Guy Hicks  
BellSouth Telecommunications, Inc.  
333 Commerce St , Suite 2101  
Nashville, TN 37201

  
\_\_\_\_\_  
Henry Walker

State of Florida



**Public Service Commission**

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

**DATE:** September 23, 2004

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bay6)

**FROM:** Office of the General Counsel (Teitzman)  
Division of Competitive Markets & Enforcement (Dowds, Kennedy)

**RE:** Docket No. 040601-TP – Petition by DIECA Communications, Inc. d/b/a Covad Communications Company for arbitration of issue resulting from interconnection negotiations with BellSouth Telecommunications, Inc., and request for expedited processing.

**AGENDA:** 10/05/04 – Regular Agenda – Section 120.57(2), Florida Statutes Post-Hearing Decision – Participation is Limited to Commissioners and Staff

**CRITICAL DATES:** October 1, 2004 – On this date BellSouth contends it is no longer obligated to provide Covad access to new line sharing arrangements.

**SPECIAL INSTRUCTIONS:**

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\040601.RCM.DOC

**Case Background**

On August 21, 2003, the Federal Communications Commission (FCC) released its Triennial Review Order<sup>1</sup> (TRO) wherein the FCC determined that the high frequency portion of the loop (HFPL) was no longer required to be unbundled pursuant to section 251 of the Telecommunications Act of 1996<sup>2</sup> (the Act). However, the FCC did require a transition period in which section 251 line sharing<sup>3</sup> will be available on a grandfathered basis for the next three years, with line sharing arrangements that existed before the effective date of the TRO remaining

<sup>1</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al*, CC Docket No. 01-338, et al., FCC 03-36 (rel Aug 21, 2003)

<sup>2</sup> TRO at ¶255-263

<sup>3</sup> Line Sharing is the practice by which a CLEC and an ILEC share a local loop. The ILEC provides voice service over the low frequency portion of the loop, and a CLEC provides data services over the high frequency portion of the loop

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at the same rates until service is discontinued and new arrangements added between October 2, 2003 and October 1, 2004 are subject to transitional rates. This determination was upheld by the D.C. Circuit Court in *United States Telecommunications Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(USTA II).

On June 23, 2004, DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) filed its Petition for Arbitration and Request for Expedited Processing of an issue resulting from interconnection negotiations with BellSouth Telecommunications, Inc. (BellSouth). Covad is requesting Commission resolution of the parties' dispute regarding line sharing rates, terms and conditions. On July 19, 2004, BellSouth filed its Response to Covad's Arbitration Petition in which they raised additional issues and requested this proceeding be treated as a change of law dispute rather than an arbitration.

On August 12, 2004, the parties filed a Joint Proposal letter. The parties stated that they had resolved Issue Nos. 2, 3, 6, 7, and 8 in their entirety and that discussions concerning Issue Nos. 4, 5, 9, and 10 are continuing. Additionally, the parties proposed a procedural schedule where each party would file a legal brief addressing the following issue:

1) Is BellSouth obligated to provide Covad access to line sharing after October 2004<sup>4</sup>?

The parties stated their intention in agreeing to limit the scope was to obtain a decision on the threshold legal question while still preserving all other arguments, including jurisdictional arguments, which each party expressly reserved. The joint proposed procedural schedule was approved by Order No. PSC-04-0833-PCO-TP, issued August 26, 2004. Both parties filed briefs on September 3, 2004.

The legal issue proposed by the parties is addressed herein and pertains to BellSouth's provision of new line sharing arrangements. The matter of the transitional period for grandfathered arrangements is not at issue between the parties. Despite a lack of clarity by the FCC in addressing this specific issue, staff believes BellSouth is not obligated to provide Covad access to line sharing after October 2004.

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<sup>4</sup> Pursuant to the FCC's transitional plan, Covad cannot request new line sharing arrangements after October 1, 2004 TRO at ¶265 Staff notes BellSouth has agreed not to take any action until October 5, 2004

### Discussion of Issues

**Issue 1:** Is BellSouth obligated to provide Covad access to line sharing after October 2004?

**Recommendation:** No. BellSouth is not obligated to provide access to line sharing after October 2004. Staff believes line sharing does not meet the definition of a loop and therefore does not fall under the requirements of section 271(c)(2)(B)(iv) of the Telecommunications Act. (TEITZMAN)

### Position of the Parties

Staff notes that for purposes of continuity and clarity and based on the structure of the parties' briefs<sup>5</sup>, staff has drafted this recommendation to first provide a summation of Covad's position and arguments in support thereof, which is followed by BellSouth's position and arguments in support thereof and its arguments in response to Covad's position. Staff then provides a summary of Covad's responsive arguments.

**Covad:** Covad contends that BellSouth's ongoing obligation to provide access to line sharing is grounded in two irrefutable legal facts: 1) Line sharing is a section 271(c)(2)(B)(iv) (checklist item 4) loop transmission facility; and 2) Regional Bell Operating Companies (RBOCs), like BellSouth, offering long distance services pursuant to section 271 authority have an obligation to provide checklist item 4 loop transmission facilities irrespective of unbundling determinations under section 251. Covad asserts that BellSouth has never disputed its obligation to provide access to line sharing if it is a checklist item 4 obligation. Rather, Covad argues, the disagreement between BellSouth and Covad centers on whether line sharing is indeed a checklist item 4 obligation.

Covad asserts there can be no legitimate debate that line sharing is a checklist item 4 loop transmission facility. Covad points to the *Massachusetts 271 Order*,<sup>6</sup> where the FCC held:

On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.<sup>7</sup>

Covad argues that the FCC placed line sharing in both checklist items 2 and 4 because at the time of the *Massachusetts 271 Order*, line sharing was required to be unbundled pursuant to section 251(c)(3). Consequently, Covad contends line sharing, along with the other section 251(c)(3) UNEs, was included in checklist item 2, which requires access to all section 251(c)(3) UNEs. Additionally, Covad asserts line sharing was included in the specific checklist item under which it falls, checklist item 4. Covad argues that the determination in the TRO that line sharing

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<sup>5</sup> In their briefs, each party addressed the anticipated arguments of the other

<sup>6</sup> *In the Matter of Application of Verizon New England, Inc et al for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) (*Massachusetts 271 Order*)

<sup>7</sup> *Id* at ¶164

was no longer a section 251(c)(3) UNE did remove line sharing from checklist item 2 but it did not remove line sharing from checklist item 4.<sup>8</sup>

In furtherance of its assertion, Covad contends that the FCC's statement in the *Massachusetts 271 Order* was not an anomaly, and that in fact, every FCC order granting any Bell Operating Company (BOC) long distance authority placed line sharing in checklist item 4. As an example, Covad cites to the Florida and Tennessee 271 Order, where the FCC determined that "BellSouth's provisioning of line-shared loops satisfies checklist item 4."<sup>9</sup> Additionally, Covad points out that BellSouth placed line sharing in every one of its own 271 briefs to the states and to the FCC under checklist item 4.<sup>10</sup> Covad asserts BellSouth did this in recognition of the fact that line sharing is a checklist item 4 network element.

Covad believes the FCC was clear in the TRO that access requirements under checklist item 4 are independent of section 251 determinations. In the TRO, the FCC explained:

Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3). Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2. Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and word of a statute.<sup>11</sup>

Covad contends it was precisely to explain the redundancy of the overlapping network access requirements in checklist item 2 and checklist items 4-6 and 10 that the FCC engaged in the TRO analysis at paragraphs 649-667.<sup>12</sup> Covad adds the FCC's interpretation of section

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<sup>8</sup> TRO at ¶ 652 ("[W]e reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain [checklist 4, 5, 6 and 10] network elements that are no longer subject to unbundling under section 251 . . ."); *see also*, *Id.* at ¶ 654, 659.

<sup>9</sup> *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331 (December 19, 2002) at ¶ 144 (Florida and Tennessee 271 Order).

<sup>10</sup> *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Florida and Tennessee, WC 02-307, filed September 20, 2002 at pp. 96-99; *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC 02-150, filed June 20, 2002 at pp. 114-116, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Georgia and Louisiana, CC 01-277, filed October 2, 2001 at pp. 112-114

<sup>11</sup> TRO at ¶ 654 (internal footnotes omitted)

<sup>12</sup> *Id.* at ¶ 651

271(c)(2)(B) reconciles the overlapping access requirement contained in checklist item 2 with the same access requirements contained in checklist items 4-6 and 10:

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously re-impose the very same requirements that another provision (section 251) has eliminated.<sup>13</sup>

Covad contends that although the price for a "de-listed" UNE may change, if that UNE falls under section 271(c)(2)(B)(iv)-(vi) or (x) (checklist items 4-6 or 10), the obligation to provide non-discriminatory access remains.<sup>14</sup>

Additionally, Covad argues the FCC's line sharing transition plan in the TRO was developed in conjunction with the FCC's section 251 unbundling analysis and, consequently, applies to ILECs for whom the obligation to provide line sharing arises under section 251.<sup>15</sup> Covad contends that since BellSouth is both an ILEC and a BOC, section 271 of the Act imposes separate and independent obligations on BellSouth.<sup>16</sup>

Covad asserts Congress crafted a different procedure for the BOCs to seek removal of their independent section 271 obligations. Covad explains that in order to remove line sharing from the list of section 271 obligations, the proper procedure is to file a Petition for Forbearance pursuant to 47 U.S.C. §160 with the FCC.<sup>17</sup> Consequently, Covad believes BellSouth is obligated to provide line sharing pursuant to section 271 unless the FCC grants a forbearance petition under 47 U.S.C. § 160 et seq., specifically forbearing BellSouth from enforcement of that obligation.

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<sup>13</sup> *Id.* at ¶659

<sup>14</sup> *Id.* At ¶658 ("Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2). Rather, the checklist independently imposes unbundling obligations, but simply does so with less rigid accompanying conditions") (emphasis added); *see also*, TRO ¶ 653 ("the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251") (emphasis added), *see also*, TRO ¶ 654

<sup>15</sup> *Id.* at ¶264 (Stating the policy objective of the transition plan as providing "carriers adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with incumbent LECs to replace line sharing")

<sup>16</sup> "[S]ection 271 places specific requirements on BOCs that were not listed in section 251 . . . recognizing an independent obligation on BOCs under section 271 would by no means be inconsistent with the structure of the statute. Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis." *Id.* at ¶655.

<sup>17</sup> Covad points out BellSouth has indeed filed a Petition with the FCC *In the Matter of BellSouth Telecommunications, Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c)*, WC Docket No. 04-48, filed March 1, 2004. (Petition for Forbearance)



**BellSouth:** BellSouth contends that pursuant to the findings by the FCC in the TRO, BellSouth is only obligated to provide Covad access to line sharing under the FCC's transitional mechanism and as a result after October 1, 2004, BellSouth is not required to provide Covad access to line sharing for new customers. BellSouth asserts that the FCC finding that line sharing did not satisfy the impairment standard under section 251 resolves this matter, and contrary to Covad's assertions that line sharing is required by section 271.

In support of its position, BellSouth asserts that the plain language of checklist item 4 contradicts Covad's argument. BellSouth contends that checklist item 4 requires access or interconnection that includes:

- (4) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

BellSouth argues that the language of checklist item 4 explicitly requires the provision of a loop, not subloops, portions of the loop, or isolated functionalities of the loop.

BellSouth asserts further that Covad's contention that line sharing involves the loop and, therefore is a section 271 requirement, is also inconsistent with the FCC's analytical framework in its Line Sharing Order, the TRO, and is a misstatement of the FCC's section 271 decisions. BellSouth contends that the FCC decided in the Line Sharing Order to designate the HFPL as an unbundled network element, separate and apart from the loop. BellSouth believes the FCC continued this distinction in the TRO when it found that competing carriers that request stand-alone copper loops are generally impaired on a national basis, while it also found that carriers that request the HFPL are not impaired under any circumstances.<sup>18</sup> BellSouth argues that Covad's contention that the FCC would conduct separate analyses of line sharing and whole loops for purposes of applying section 251, but combine the two provisions together without distinction for purposes of applying section 271 defies logic.

In its brief, BellSouth argues that Covad's reliance on the FCC's section 271 decisions is misplaced. BellSouth asserts that Covad appears to ignore the first two FCC decisions granting long distance authority to a BOC. In both the *Bell Atlantic New York 271 Order*<sup>19</sup> and the *SBC Texas 271 Order*<sup>20</sup> the FCC granted long distance authority without requiring line sharing. BellSouth argues if line sharing had been required in order to receive long distance authority under checklist item 4, then the FCC could not have granted long distance authority in those orders.

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<sup>18</sup> TRO at 248, 258

<sup>19</sup> *In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, CC Docket No. 99-295, 15 FCC Rcd 3953 (Dec 22, 1999) at n. 70 (Bell Atlantic New York 271 Order)

<sup>20</sup> *In the Matter of Application by SBC Communications, Inc., et al., Pursuant to section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, 15 FCC Rcd 18354 (June 30, 2000) at ¶271 (SBC Texas 271 Order)

BellSouth believes that the FCC has consistently treated the loop and the HFPL as separate elements. Citing both the *SBC Illinois/Indiana/Ohio 271 Order*<sup>21</sup> and the *Qwest Arizona 271 Order*,<sup>22</sup> both of which were issued after the TRO became effective, BellSouth points to the fact that the FCC required, as part of the showing, that an applicant must satisfy the FCC's old rules concerning UNEs. After making this finding, the FCC then went on to list the UNEs an ILEC is obliged to provide and listed local loops and subloops separate from the HFPL. BellSouth argues this distinction by the FCC further supports its contention that even under the FCC's old unbundling rules, the loop and the HFPL were treated as separate elements.

Additionally, BellSouth argues the FCC's 271 Orders demonstrate that the line sharing analysis in these orders relates to the FCC's unbundling obligations as contained in federal rules and is not an implicit recognition of a statutory obligation. BellSouth cites to language in the *SBC Illinois/Indiana/Ohio 271 Order* which states:

Based on the evidence in the record, we conclude . . . that SBC provides unbundled local loops in accordance with the requirements of section 271 and our rules. Our conclusion is based on our review of SBC's performance for all loop types which include voice grade loops, xDSL capable loops, digital loops and high capacity loops, as well as our review of FCC's processes for hot cut provisioning, and line sharing and line splitting.<sup>23</sup>

BellSouth argues that it is readily apparent that the FCC's analysis relating to hot cuts, line sharing and line splitting is not based upon the requirement of checklist item 4 as expressly articulated in the Act, but rather upon the FCC's rules. BellSouth explains that if a requirement to provide line sharing (or line splitting and hot cut provisioning) resides in checklist item 4, rather than the FCC's unbundling rules, then there is nothing left to be considered as part of the checklist item 4 analysis that does arise from the FCC's rules, which would render the citation to the rules meaningless. BellSouth contends the FCC, by referring to its rules in its checklist item 4 discussion, clearly analyzes both the actual checklist item 4 loop provisioning requirement and related requirements, such as line sharing, that arise from the unbundling rules.

BellSouth adds that any reliance by Covad on the fact that the TRO did not change or modify the existence of line sharing as a checklist item 4 requirement is flawed. BellSouth argues that the FCC did not change or modify the existence of line sharing as a checklist item 4 requirement because there would be no need to modify a non-existent obligation.

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<sup>21</sup> *In the Matter of Joint Application by SBC Communications, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, (Released October 15, 2003) (*SBC Illinois/Indiana/Ohio 271 Order*)

<sup>22</sup> *Application by Qwest Comm. International, Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, Memorandum Opinion and Order (Released Dec. 3, 2003) (*Qwest Arizona 271 Order*)

<sup>23</sup> *SBC Illinois/Indiana/Ohio 271 Order* at ¶142

BellSouth argues further that any reliance by Covad on paragraph 659 of the TRO, which suggests that section 271 obligations may exist independently of section 251 obligations, is unjustified. BellSouth asserts that paragraph 659 does nothing to suggest that a line sharing 271 obligation exists to begin with. BellSouth adds there is no discussion of line sharing at any point in the fifteen paragraph discussion of section 271 obligations contained within the TRO.

**Covad** Covad believes BellSouth's strict interpretation of the language of checklist item 4 fails to even reference the FCC's clarifying definition of "loop."<sup>24</sup> Covad asserts that in the TRO, the FCC defined the HFPL as "a complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises."<sup>25</sup> Covad argues because the HFPL is "a complete transmission path" over the loop, it constitutes a form of "loop transmission facility" under the FCC's definition for checklist item 4 elements.<sup>26</sup> Covad adds BellSouth routinely uses the HFPL transmission channel to provide xDSL services.<sup>27</sup> Consequently, Covad contends the FCC and BellSouth always considered the HFPL under checklist item 4 because the HFPL is a type of loop transmission facility.

Covad argues further that BellSouth's assertions regarding paragraph 142 of the *SBC Illinois/Indiana/Ohio 271 Order* and the phrase "and our rules" in the first sentence grossly mischaracterizes the *SBC Illinois/Indiana/Ohio 271 Order*. Covad contends that BellSouth, having gone through the section 271 application process, knows well what the reference to "our rules" means: FCC rules governing the provision of the section 271 network elements in question, such as access to loop make-up information, repair, provisioning, and ordering. Covad states that the same sentence from the *Massachusetts 271 Order* reads:

Based on the record before us, we conclude that Verizon has adequately demonstrated that it provides unbundled local loops as required by section 271 and our rules. First, as described above, we find that Verizon provides access to loop make-up information in compliance with the *UNE Remand Order*. Second, we find that Verizon provides nondiscriminatory access to stand alone xDSL-capable loops and high-capacity loops. Third, we find that Verizon provides voice grade loops, both as new loops and through hot-cut conversions, in a non-discriminatory manner. Finally, we find that Verizon has demonstrated that it has a line sharing and line-splitting provisioning process that affords competitors nondiscriminatory access to these facilities. In doing so, we acknowledge that the Massachusetts Department also concludes that Verizon complies with this checklist item.<sup>28</sup>

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<sup>24</sup> *Id*

<sup>25</sup> TRO ¶268

<sup>26</sup> *Id*

<sup>27</sup> Covad explained further that Bell customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services over the HFPL

<sup>28</sup> *Massachusetts 271 Order* ¶ 125

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Covad argues the *Massachusetts 271 Order* expressly identifies one source of FCC rules: The *UNE Remand Order*. Covad argues further that the *Massachusetts 271 Order* not only lists line sharing among the loop types required under checklist 4, but expressly identifies line sharing as a checklist item 4 element:

On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.<sup>29</sup>

**Staff Analysis:** Staff believes analysis of the parties' briefs lead to the conclusion that the FCC has not clearly defined a BOC's obligation to provide line sharing pursuant to section 271 of the Act. In certain orders, the FCC seems to indicate that line sharing does fall under checklist item 4 and therefore a BOC has a continuing obligation to provide access to line sharing as a UNE.<sup>30</sup> Other orders indicate that line sharing is not required under checklist item 4, and therefore the FCC's finding of no impairment in the TRO would relieve a BOC from its obligation to provide line sharing.<sup>31</sup>

Staff notes that the Commission has previously addressed this issue and come to a similar conclusion regarding the lack of clarity by the FCC.

Finally, we note that the CLEC's have made the argument that LEC obligations under sections 251 and 271 of the Telecommunications Act may differ and that while line sharing has been removed from the list of 251 UNEs, it remains a 271 obligation. We find that the answer to this argument is not clear at this time. However, it is not necessary for us to address this issue, which appears premature, because the FCC has clearly outlined a three-year transition period for line sharing. As such, we need not address this argument now. As TRO proceedings in court and at the state level proceed, it is hoped that the law on this point will be clarified.<sup>32</sup>

While some states have begun to address this issue,<sup>33</sup> the FCC has yet to provide additional guidance. Staff notes that there are currently two proceedings that may provide further guidance

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<sup>29</sup> *Massachusetts 271 Order* at ¶164

<sup>30</sup> *Id* See also *Florida and Tennessee 271 Order* at ¶144

<sup>31</sup> *Georgia 271 Order* at ¶239. See also *Illinois, Indiana, Ohio, and Wisconsin 271 Order* at ¶142

<sup>32</sup> PSC Order No. PSC-04-511-PAA-TP, issued May 19, 2004, in Docket No. 000121A-TP (May 19<sup>th</sup> Order)

<sup>33</sup> The Maine Public Utilities Commission held that it has authority under state law to order unbundling of line sharing and that it will proceed to investigate whether to exercise that authority. *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection and Resold Services*, Order Part II, Docket No. 2002-682 (September 3, 2004) See also *Covad Communications Company v. Verizon Pennsylvania Inc.*, Pennsylvania Public Utility Commission, Opinion and Order, Docket No. R-00038871C0001, issued July 8, 2004. (Pennsylvania Commission held that "[u]nless or until the FCC affirmatively relieves Verizon

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regarding the section 271 status of line sharing. The FCC's Interim Order and NPRM<sup>34</sup> seeks comments on,

How various incumbent LEC service offerings and obligations, such as tariffed offerings and BOC section 271 access obligations, fit into the Commission's unbundling framework.<sup>35</sup>

Additionally, BellSouth's Petition for Forbearance before the FCC may provide further guidance. However, staff notes a decision by the FCC in either of these two matters is not expected for several months at the earliest.

As indicated above, when the Commission previously addressed this issue, it found that a determination was premature because the FCC had outlined a three-year transition period. The transition period is now entering year 2, and Covad requests the Commission revisit the issue because BellSouth, pursuant to the transition mechanism set out by the FCC in the TRO, has stated it will no longer provide Covad access to new line sharing arrangements. Accordingly, staff believes it is appropriate now to address this matter.

In light of the inconsistent regulatory treatment of section 271 line sharing by the FCC, staff believes the Commission should look to the plain language of section 271, which provides, in pertinent part,

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunication carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

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(iv) Local loop transmission from the central office to the customer's premises unbundled from local switching.

Staff agrees with the parties that line sharing is the practice by which a CLEC and an ILEC share a local loop. The ILEC provides voice service over the low frequency portion of the loop, and a CLEC provides data services over the high frequency portion of the loop. However, based on this understanding of line sharing, staff does not believe line sharing meets the requirements of the item 4 checklist. Staff recommends that line sharing is properly identified as a process that utilizes a loop, rather than constituting a loop by itself. Further, staff believes

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PA of this section 271 access obligation imposed as a condition of section 271 approval, we will not relieve Verizon PA of its corresponding tariff obligation to provide such access."

<sup>34</sup>In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, rel August 20, 2004 (Interim Order and NPRM).

<sup>35</sup> Id at ¶9.

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support for this position is found in the FCC's recent 271 Orders. In the Florida and Tennessee 271 Order, the FCC found:

As in past section 271 orders, our conclusion is based on our review of BellSouth's performance for all loop types, including voice grade loops, xDSL-capable loops, high capacity loops, and digital loops, as well as our review of BellSouth's hot cut, line sharing and line splitting processes.

Florida Tennessee 271 order at ¶132.<sup>36</sup>

Staff believes it is improper to identify a line-shared loop as a separate "loop type." Thus, staff recommends that line sharing is not a "local loop transmission from the central office to the customer's premises" as required by checklist item 4. If line sharing does not come under checklist item 4 and therefore is not required to be provided pursuant to section 271, staff believes BellSouth is no longer obligated to provide Covad access to new line sharing arrangements after October 2004. Consequently, in the absence of a definitive determination regarding line sharing by the FCC and based on a plain reading of the checklist item 4 requirement, staff recommends the Commission find that BellSouth is not obligated to provide access to new line sharing arrangements after October 2004.

**Issue 2:** Should this docket be closed?

**Recommendation:** No, this docket should remain open to address the remaining open issues.  
(TEITZMAN)

**Staff Analysis:** This docket should remain open to address the remaining open issues.

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<sup>36</sup> See also Georgia and Louisiana 271 Order at ¶239, See also Illinois, Indiana, Ohio and Wisconsin 271 Order at ¶142.